R Thangaratnam d/o Vythilingam v Vinayagamoorthy a/l Rajaratnam & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO N-02–135 OF 1995
ABDUL AZIZ MOHAMAD, JAMES FOONG AND ZALEHA ZAHARI JJCA
27 DECEMBER 2007

Land Law — Power of attorney — Effect of — Mother authorising son by letter to transfer her property to himself — Mother subsequently executing power of attorney in favour of son — Whether son's authority to effect transfer based upon mother's letter or power of attorney — Whether power of attorney merely an instrument empowering son to execute relevant documents to effect transfer

Land Law — Transfer — Gift — Mother authorising son to transfer her property to himself — Son transferring property to his own beneficiary — Whether son free to transfer such property to his beneficiary — Whether mother's objection to son's subsequent transfer well-founded

The appellant was the registered proprietor of a piece of land ('the property'). Her son — the first respondent — suggested that she transfer the property to him. By letter dated 23 December 1983, the appellant wrote to the first respondent authorising him to transfer the property to his name. The appellant subsequently executed a power of attorney in Sri Lanka in favour of the first respondent, which power of attorney was registered in the High Court of Malaya on 12 June 1984. However, on 19 March 1984, the first respondent transferred the said property to the second respondent as trustee for the third respondent. The third respondent was the son of the first respondent and grandchild of the appellant. With such transfer, the third respondent effectively became the beneficial registered proprietor of the said property. The appellant took issue and claimed that she never consented to transfer the said property to the third respondent. The appellant thus filed an action in the High Court seeking, inter alia, to declare the transfer ultra vires, illegal and void and sought an order compelling the second respondent to retransfer the said property to her, free of any encumbrances. The High Court however dismissed the appellant's claim. The High Court held that if the appellant had intended to transfer the said property to the first respondent as indicated by the power of attorney and her letter dated 23 December 1983, there was no restriction on the first respondent to transfer the property

straight to his son — the third respondent. The High Court then went on to hold that though the power of attorney did not authorise the first respondent to transfer the said property to himself, nevertheless the appellant's letter of 23 December 1983 would have overcome any shortcoming. The appellant appealed to the Court of Appeal. It was the appellant's submission that the High Court had erred in deciding that the power of attorney could be cured and/or substituted by the letter dated 23 December 1983 giving 'extra power' to the first respondent.

Held, dismissing the appeal with costs:

(1) (per **James Foong** and **Zaleha Zahari JJCA**) The authority for the first respondent to transfer the said property was not grounded on the power of attorney. It came from the appellant's letter to the first respondent dated 23 December 1983 which authorised the first respondent to transfer the said property to himself. The power of attorney was only an instrument to arm the first respondent with power to execute the memorandum of transfer and other relevant documents in order to give full effect to the transfer of the said property (see para 21).

(2) (per **James Foong** and **Zaleha Zahari JJCA**) Since it was the appellant's letter of 23 December 1983 that gave the authority to the first respondent to transfer the said property, and the power of attorney was only an instrument to effect the transfer, there was no issue of the appellant's letter of 23 December 1983 providing 'extra power' to the first respondent to transfer the said property. The High Court was thus wrong in this regard (see para 21).

(3) (per **James Foong** and **Zaleha Zahari JJCA**) Once the appellant had given the authority to the first respondent to transfer the said property to himself, the first respondent had every right to have the said property transferred to anyone he nominated. The authority given by the appellant to the first respondent amounted to a gift by the mother to her son and once given, the son could elect to nominate anyone to be the registered proprietor. The appellant could not object to this (see para 22).

(4) (per **Abdul Aziz Mohamed JCA (now FCJ)**, concurring with the majority) The question of 'extra power' through the appellant's letter dated 23 December 1983 being loaded onto the power of attorney did not arise. There was also no fraud, whether civil or criminal (see para 5).

[Bahasa Malaysia summary

Perayu merupakan tuan punya berdaftar sebidang tanah ('hartanah tersebut').

A Anak lelakinya — responden pertama — mencadangkan bahawa beliau memindahkan hartanah tersebut kepadanya. Melalui surat bertarikh 23 Disember 1983, perayu telah menulis kepada responden pertama memberikan kuasa kepadanya untuk memindah hartanah tersebut ke atas namanya. Perayu kemudiannya menyempurnakan surat kuasa wakil
B di Sri Lanka menyebelahi responden pertama, surat kuasa wakil yang mana didaftarkan di Mahkamah Tinggi Malaya pada 12 Jun 1984. Walau bagaimanapun, pada 19 Mac 1984, responden pertama telah memindahkan hartanah tersebut kepada responden kedua sebagai pemegang
C amanah untuk responden ketiga. Responden ketiga merupakan anak lelaki responden pertama dan cucu perayu. Dengan pemindahan sedemikian responden ketiga secara efektif menjadi tuan punya benefisiari berdaftar hartanah tersebut. Perayu tidak puas hati dan mendakwa bahawa beliau tidak pernah menyetujui pemindahan hartanah tersebut kepada responden ketiga.
D Perayu oleh itu telah memfailkan satu tindakan di Mahkamah Tinggi memohon, antara lain, untuk mengisytiharkan pemindahan tersebut ultra vires, menyalahi undang-undang dan terbatal dan memohon satu perintah memaksa responden kedua untuk memindah semula hartanah tersebut kepadanya, bebas daripada sebarang sekatan. Mahkamah Tinggi walau
E bagaimanapun menolak tuntutan perayu. Mahkamah Tinggi memutuskan bahawa jika perayu berniat untuk memindahkan hartanah tersebut kepada responden pertama sebagaimana yang ditunjukkan oleh surat wakil kuasa dan suratnya bertarikh 23 Disember 1983, tiada halangan ke atas responden
F pertama untuk memindahkan hartanah itu terus kepada anak lelakinya — responden ketiga. Mahkamah Tinggi seterusnya memutuskan bahawa meskipun surat kuasa wakil itu tidak memberi kuasa kepada responden pertama untuk memindahkan hartanah tersebut kepada dirinya sendiri, namun surat perayu bertarikh 23 Disember 1983 mengatasi sebarang
G kekurangan. Perayu telah merayu ke Mahkamah Rayuan. Ia adalah hujahan perayu bahawa Mahkamah Tinggi terkhilaf dalam memutuskan bahawa surat kuasa wakil boleh dipulihkan dan/atau digantikan dengan surat bertarikh 23 Disember 1983 memberikan 'extra power' kepada responden pertama.

H

Diputuskan, menolak rayuan dengan kos:

(1) (oleh **James Foong** dan **Zaleha Zahari HHMR**) Kuasa untuk responden pertama memindahkan hartanah tersebut tidak berasaskan
I kepada surat kuasa wakil. Ia wujud daripada surat perayu kepada responden pertama bertarikh 23 Disember 1983 yang memberi kuasa kepada responden pertama untuk memindah hartanah tersebut kepada dirinya sendiri. Surat kuasa wakil hanya alat untuk memberikan responden pertama kuasa untuk menyempurnakan memorandum

pemindahan dan dokumen-dokumen lain yang relevan untuk memberi kesan sepenuhnya terhadap pemindahan hartanah tersebut (lihat perenggan 21).

(2) (oleh **James Foong** dan **Zaleha Zahari HHMR**) Memandangkan ia adalah surat perayu bertarikh 23 Disember 1983 tersebut yang memberikan kuasa kepada responden pertama untuk memindahkan hartanah tersebut, dan surat kuasa wakil hanya suatu alat untuk melaksanakan pemindahan tersebut, tiada isu bahawa surat bertarikh 23 Disember 1983 memberikan 'extra power' kepada responden pertama untuk memindahkan hartanah tersebut. Mahkamah Tinggi oleh itu salah dalam perkara ini (lihat perenggan 21).

(3) (oleh **James Foong** dan **Zaleha Zahari HHMR**) Setelah perayu memberikan kuasa kepada responden pertama untuk memindahkan hartanah tersebut kepada dirinya sendiri, responden pertama mempunyai hak untuk memindahkan hartanah tersebut kepada sesiapa yang dipilihnya. Kuasa yang diberikan oleh perayu kepada responden pertama merupakan hadiah oleh ibu kepada anak lelakinya dan setelah diberikan, anak lelakinya boleh memilih sesiapa sahaja untuk menjadi tuan punya berdaftar. Perayu tidak boleh membantah perkara ini (lihat perenggan 22).

(4) (oleh **Abdul Aziz Mohamed HMR (sekarang HMP)**, bersetuju dengan majoriti) Persoalan 'extra power' melalui surat perayu bertarikh 23 Disember 1983 yang diberikan dalam surat kuasa wakil tidak timbul. Juga tidak terdapat fraud, sama ada sivil atau jenayah (lihat perenggan 5).]

Notes

For a case on effect of power of attorney generally, see 8(2) *Mallal's Digest* (4th Ed, 2006 Reissue) para 3422.

For cases on gift, see 8(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 4606–4607.

Cases referred to

Reckitt v Barnett, Pembroke & Slater Ltd [1929] AC 176 (refd)

Legislation referred to

National Land Code ss 309, 310, 311, 340, 340(2)(a)
Powers of Attorney Act 1949 s 3(1)(a)

Appeal from: Civil Suit No 22–158 of 1989 (High Court, Seremban)

Sri Dev Nair (Nora Hayati and B Sivaruben with him) (Nora Hayati & Associates) for the appellant.

AD Rajah (CS Khoo with him) (AD Rajah) for the respondents.

Abdul Aziz Mohamad JCA (now FCJ):

[1] Having read in draft the grounds of judgment of my learned brother James Foong JCA, I feel obliged to say a few words for my part.

[2] In his oral submission in the appeal, the appellant's counsel indicated that he would be submitting on two issues, the first issue being whether the power of attorney that the appellant granted to the first respondent, her son, could be varied or altered by the appellant's letter dated 23 December 1983, by which she asked the first respondent to transfer the land into his name and which her counsel said could not amount to a variation of the power of attorney.

[3] As for the second issue, the appellant's counsel said that it would concern the question of the burden of proof on the appellant to prove fraud, the fraud being, counsel said, in the transference of the land into the first appellant's name as trustee for his son the third respondent. It is a fact that in para 6 of the statement of claim the appellant's case was one of fraud on the part of the first respondent. It is also a fact that in paras 7 and 8 of the statement of claim the appellant's case was also one of conspiracy on the part of the first and fourth respondents to cheat and defraud the appellant, in which the main allegation was that the appellant's letter of 23 December 1983 was a forgery devised by the fourth respondent, the first respondent's brother, the action against whom was, however, withdrawn upon his demise. And it was obvious from the memorandum of appeal that the appellant was not taking up in the appeal the question of conspiracy-forgery but only the question of variation of the power of attorney by the letter of 23 December 1983. The appellant's counsel said that the need to prove fraud related to s 340 of the National Land Code. According to sub-s (2)(a) of the section, the first defendant's title to the land as trustee for the third respondent would become defeasible if he was party to a fraud in his getting on the title. Counsel said that the trial judge applied the criminal burden. Obviously he intended to show when coming to submit on the second issue that the civil burden should have been applied.

[4] After hearing the appellant's counsel in elaboration of the first issue, in which the facts of the case were glimpsed, we decided, after a half-hour recess, to dismiss the appeal without hearing counsel on the second issue and without hearing the respondents' counsel, the reason that was announced being that after hearing the submission of the appellant's counsel on the first issue we were of the view that there was no fraud, whether civil or criminal.

[5] It seemed to me that the appellant's submission on the first issue, whether the power of attorney could be varied by the letter of 23 December 1983, was aimed at showing the existence of fraud in the civil sense. I thought that the question was misconceived, my reasons being the same as those for which my learned brother says at the end of the first paragraph under his 'Analysis': 'So the question of 'extra power' through the appellant's letter dated 23 December 1983 to be loaded onto the power of attorney does not arise'. As for my finding that there was no fraud, whether civil or criminal, my reasons were as stated in my learned brother's second paragraph under his 'Analysis'.

James Foong JCA:

INTRODUCTION

[6] The appellant passed away on 1 September 1995. Her son, one Balasekaran a/l Rajaratnam, is the administrator of her estate. He has substituted her in this appeal.

[7] The first respondent has also passed away on 19 May 1995 and is substituted in this appeal by his administratix, one Agilesvary w/o Vinayagamoorthy.

[8] The fourth respondent has also passed away and the appellant, before her demise, had discontinued this suit against the estate of the fourth respondent on 21 September 1992.

[9] The parties in this appeal are all related. They are of Ceylonese origin. The appellant was the mother of the first and fourth respondents. The third respondent was her grandson and the son of the first respondent. The second respondent is also the first respondent but in the capacity as trustee for the third respondent. At all material times, the appellant resided in Sri Lanka while the first respondent lived in Malaysia.

[10] The appellant had a piece of land held under Grant No 1199 for Lot No 392, Mukim Rasah, Daerah Seremban, Negeri Sembilan ('the said property'). Regarding this said property, the appellant and the first respondent corresponded with each other as follows:

[11] On 19 September 1983, the first respondent in a letter to the appellant requested:

Mother, I have already write to you about the land in Seremban. Previously you have asked my opinion. Mother, since the land is under your name, I will do as what you instruct me to do. In my view it could be transferred to any one's name.

[12] The appellant responded on 19 October 1983:

At first, I thought of transferring the property in Seremban to Bala (another son of the appellant), but seeing his behaviour when he came down here, I had no intention to do so. However I still consider because I have love for him. I'm writing for your answer and let me know your intention. At one time I feel like transferring the property to his name and another time I think no need. Please write your opinion.

[13] On 5 December 1983, the first respondent gave his opinion:

Mother, I had wrote to you earlier about Seremban land. You ask me about my opinion. This land was bought by father with his earning and he transferred it to your name as he wished. So you can transfer as you wish. If you ask my view, I could say that, as the elder son to you, I'm requesting the land title to be transferred to my name. What is your intention?

[14] The appellant replied the first respondent on 23 December 1983:

We received your letter and Understood the contents.

Transfer the property in Seremban to your name. But, till I am alive let me have the profit.

[15] Subsequent to this letter, the appellant forwarded to the first respondent a general power of attorney ('the power of attorney') which she granted in favour of the first respondent. Though this power of attorney was executed by the appellant in Sri Lanka on 5 May 1973, it was only registered with the High Court of Malaya on 12 June 1984.

[16] Attempting to transfer the said property with the power of attorney, the first respondent encountered the following problem which he informed the appellant by letter on 10 February 1984:

Mother, there is a small problem in transferring the name in the Seremban Land Title. When I gave the Land Title to our Lawyer, he told me that your name in the Land Title appears as THANGRATNAM D/O VYTHILINGAM whereas in the power of attorney which I received from you, your name appears as THANGRATNAM RAJA RATNAM. Because of the difference in the names, the Land Office reject your application to transfer the name. If you do a statutory Declaration saying that both the names are referring (sic) to yourself, then only we

can transfer the name. Together with this, I'm enclosing a sample of Statutory Declaration Form. So you do a declaration as above and send to me. Then only can I do the necessary things for transfer.

[17] On 27 February 1984, the appellant executed a statutory declaration in Sri Lanka before a notary public to rectify the inconsistency regarding her name in the document of title with that stated in the power of attorney and forwarded it to the first respondent. With the aid of this statutory declaration, and in his capacity as the appellant's attorney, the first respondent on 19 March 1984 transferred the said property not to himself but to the second respondent and himself as trustees for the third respondent. Effectively, the third respondent became the beneficial registered proprietor of the said property.

THE APPELLANT'S CLAIM

[18] The appellant took issue on this and filed this action. She claimed that she has never consented to transfer the said property to the third respondent and asserted that the first and second respondent had 'wrongfully and fraudulently transferred' the said property for love and affection to the third respondent. In para 7 of her statement of claim, the appellant asserted that by 'a letter dated 23 December 1983, the first defendant (first respondent) wrongfully, unlawfully and fraudulently conspired and agreed together with the fourth defendant (the fourth respondent) to cheat and defraud the plaintiff (the appellant) of her land in Grant for Land No 1199, Lot No 392 in the Mukim of Rasah, Daerah Seremban'. Because of these, in paras 14 of her statement of claim, she requested for:

(a) A declaration that the transfer made between the first defendant to the second defendant as trustee for the third defendant is untra (sic) vires, illegal and void;

(b) A mandatory order that the second defendant shall forthwith re-transfer the property held under Grant for Land No 1199, Lot No 392 in the Mukim of Rasah, Daerah Seremban transferred under Presentation No 5108/ 84, Jilid 1020, Folio 38 to the plaintiff free from encumbrances;

(c) An order that the first, second and third defendants do pay to the plaintiff sums of money which is due to the plaintiff upon taking of the said accounts;

(d) An order that the first, second and third defendants pay to the plaintiff all such sums of money by way of income received from the said property upon the taking of the said accounts and for repayment of all sums of money to the plaintiff with interest at 12% per annum ...

A THE HIGH COURT'S RULING

[19] The High Court after a full trial dismissed the appellant's claim. The learned trial judge was firstly of the view that if the appellant had intended to transfer the said property to the first respondent as indicated by the power of attorney and her letter to the first respondent dated 23 December 1983, then there is no restriction on the first respondent to transfer it straight to his son. The learned trial judge then went on to elaborate that though the power of attorney did not give authority to the first respondent to transfer the said property to himself but the appellant's letter of 23 December 1983 would have overcome this shortcoming. To support this proposition, he cited amongst others, the case of *Reckitt v Barnett, Pembroke & Slater Ltd* [1929] AC 176. In addition, the learned trial judge found that since the appellant had not pleaded s 340 of the National Land Code ('NLC'), she could not claim that the transfer of the said property to the current registered proprietors is invalid due to inadequacy in the instrument of transfer. The learned trial judge then held that since the appellant has failed to prove beyond reasonable doubt that fraud was perpetuated against her by the relevant respondents, her claim is dismissed.

E THE APPELLANT'S CONTENTION

[20] Before us, the appellant only submitted on one ground: 'The learned trial judge erred in law and fact in finding that the powers contained in the general power of attorney dated 5 May 1973 can be cured and/or substituted by a letter of the donor to give extra power to the first respondent/defendant to transfer the land to himself as trustee for the third respondent when the first respondent fails to comply with s 3(1)(a) of the Powers of Attorney Act 1949 and ss 309–311 of the National Land Code.'

G ANALYSIS

[21] From this contention, it is obvious that the appellant is utilising the approach adopted by the learned trial judge to challenge the validity of the transfer of the said property by the first respondent to the third respondent. In short, what she is saying is that when the power of attorney does not provide authority to the first respondent, the appellant's letter of 23 December 1983 cannot remedy this. This argument obviously arose from the approach adopted by the learned trial judge as one of his grounds in arriving at his decision. But in my opinion this approach of the learned trial judge is incorrect in the face of the chronology of events. The authority for the first respondent to transfer the said property is not grounded on the power of attorney. It came from the appellant's letter to the first respondent dated 23 December 1983 which authorises the first respondent to transfer the

said property to himself. Whether the first respondent could transfer it to his son and not himself is a matter which I shall be coming to shortly. But as far as the authority to transfer is concerned it is based on the appellant's letter of 23 December 1983. The power of attorney, in my opinion, was only an instrument to arm the first respondent with power to execute the memorandum of transfer and other relevant documents in order to give full effect to the transfer of the said property. Clause 4 of the power of attorney caters for this when it says that in 'the event of any such purchase, sale ... to sign and execute and deliver all deeds and other writings necessary for giving effect and validity to the same respectively ...'. And this instrument (the power of attorney) only came about after the appellant's letter of 23 December 1983. This is detected from the first respondent's subsequent letter to the appellant dated 10 February 1984 which says 'whereas in the power of attorney which I received from you your name appears as ...'. Another indication that the power of attorney was given to the first respondent subsequent to the appellant's letter of 23 December 1983 is the registration of this instrument with the High Court of Malaya on 12 June 1984. Though this power of attorney was executed by the appellant in Sri Lanka at an earlier date, but to be effective in this country it was from the date of registration with our High Court. Approaching this matter from this angle ie that it was the appellant's letter of 23 December 1983 that gave the authority to the first respondent to transfer the said property and the power of attorney was only an instrument to effect the transfer, then there is no issue of the appellant's letter of 23 December 1983 providing 'extra power' to the first respondent to transfer the said property. The first respondent was already well equipped with authority to transfer and was only using the power of attorney to execute the relevant memorandum of transfer and other relevant and necessary documents to give full effect to the transfer. So the question of 'extra power' through the appellant's letter dated 23 December 1983 to be loaded onto the power of attorney does not arise. The learned trial judge has relied on the wrong sequence of facts.

[22] Though the learned trial judge is wrong in his approach but it is my opinion that this does not affect the outcome of his decision in dismissing the appellant's claim. The main crux of the appellant's claim is whether the first respondent can transfer the said property to his son rather than the manner in which it was done. On this issue, I agree with the learned trial judge that once the appellant had given authority to the first respondent to transfer the said property to himself, the first respondent has every right to have the said property transferred to whoever he nominates. The authority given by the appellant to the first respondent amounts to a gift by the mother to her son and once given, the son can elect to nominate whoever to be the registered proprietor. The appellant cannot object to this. As the answer to this issue is

against the appellant, the learned trial judge has not erred in finding against the appellant.

CONCLUSION

[23] For reasons aforesaid, I dismissed the appeal with costs. Deposit for this appeal to the respondents towards account of taxed costs.

[24] My sister Justice Zaleha Zahari has read this judgment in draft and has concurred with the contents therein.

Appeal dismissed with costs.

Reported by Andrew Christopher Simon